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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CURT LEROY FREEMAN, Defendant and Appellant.	E038826 (Super.Ct.No. SWF9268) OPINION

APPEAL from the Superior Court of Riverside County. Albert J. Wojcik, Judge. Affirmed and remanded for resentencing.

Jean F. Matulis, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, David Delgado-Rucci and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Curtis Freeman admitted a five-year sexual relationship with his niece Annette but claimed the sex was consensual. Annette testified that the sex was not consensual and the jury believed her.

Defendant was therefore convicted of two counts of sodomy by force (Penal Code[1] § 286, subd. (c)(2)); two counts of attempted rape by force (§§ 664/261); two counts of oral copulation by force (§ 288a, subd. (c)(2)); and one count of penetration with a foreign object. (§ 289, subd. (a).) The jury also found that the victim was particularly vulnerable and that defendant took advantage of a position of trust and confidence to commit the offenses.

Having been sentenced to 42 years in prison, defendant appeals, contending that (1) the trial court erred by failing to instruct on lesser included offenses; (2) there was insufficient evidence of forced oral copulation; (3) the imposition of consecutive sentences was error; and (4) the imposition of a restitution fine of $50,000 under section 1202.4, subdivision (f)(3)(F) was improper. Respondent agrees that the restitution fine was improper and, therefore, concedes that issue. We conclude that the fine should not have been imposed but otherwise find no error.

FACTUAL AND PROCEDURAL HISTORY

The victim, Annette, was age 38 at time of trial. She is deaf and afflicted with cerebral palsy. She is five feet tall and weighs about 130 pounds. Defendant described

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[1] All further statutory references will be to the Penal Code unless otherwise indicated.

her as frail and handicapped. Defendant also testified that she is timid, has a hard time communicating with people and has few social contacts. Defendant believed that she was communicating at a fifth grade level and found her behavior childlike but he also acknowledged that she was an adult and was "slow" but not mentally retarded.[2]

Annette lived with her grandmother until she was 18 years old. The grandmother died in 1984 and Annette came to live with defendant and his wife Nancy. Annette lived with them for 20 years, and the molestations occurred in the last five years, ending when Annette complained to relatives on March 16, 2004.

Defendant was age 54 at trial. He is six feet five inches tall and weighs 285 pounds. He also has physical disabilities, primarily a missing right hip.

Defendant testified that sexual activities with Annette began in 1999. They progressed to the charged offenses. With regard to those offenses, defendant admitted three specific acts of sodomy and admitted that one of the three occasions was forced. Defendant testified that he rubbed his penis against her vaginal area on one occasion. Defendant also admitted one instance in which Annette orally copulated him, and one instance in which he orally copulated Annette. As noted above, defendant testified that all the sex was consensual.

Annette testified that defendant tried to have anal sex on a number of occasions but it is unclear from her testimony how many times he did so. She also testified that he

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[2] An expert examined Annette and concluded: "Her overall ability to function intellectually, solve problems in the community or with her daily living skills, is approximately low average." The expert also testified that the interpreter told him that Annette was communicating at approximately the fifth or sixth grade level.

tried to put his penis in her vagina a few times but was unsuccessful because she could not open her legs due to the cerebral palsy. Annette also described the acts of oral copulation and testified that defendant inserted his fingers into her vagina. She described all the sex as forced.

DISCUSSION

A. Lesser Included Offense Instructions

Defendant first directs our attention to the sodomy convictions. He argues that the trial court had a sua sponte duty to instruct on the lesser included offenses of attempted sodomy and battery. The factual basis for his argument is based on Annette's testimony that failed to differentiate between the terms "butt" and "anus." She testified that he tried to penetrate her anus with his penis but he could not do so. However, she also testified that he was able to insert a portion of his penis into her anus. Her testimony was not clear as to the number of times this happened but she testified that it happened regularly.

As noted above, defendant was charged with two counts of sodomy by force and he admitted three instances of sodomy. He also testified that one of the instances was forced. The issue raised by defendant's argument is whether the evidence supports the conclusion that the second sodomy count was based on an attempt rather than a completed act.

The parties agree on the applicable legal principles. The trial court has a sua sponte duty to instruct on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present and there is evidence which would justify a conviction of such a lesser offense. (*People v. Hughes* (2002) 27

Cal.4th 287, 365.) As our Supreme Court said in *Hughes*: "instructing on lesser included offenses shown by the evidence avoids forcing the jury into an 'unwarranted all-or-nothing choice'" that could lead to an improper conviction. (*Ibid.*) However, the instruction need not be given if there is no evidence that the offense was less than the offense charged. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

We agree with respondent that there was evidence here of more than two instances of sodomy. Defendant admitted to police that he had anal sex with Annette three times and he testified that the second instance occurred in the same manner as the first. His testimony alone defeats the theory that the second instance was merely an attempt or a battery. While Annette's testimony establishes that there were many attempts, it also establishes that there were at least two penetrations. We therefore conclude that there was no evidence to support an attempt theory as to the two charged sodomy offenses. Accordingly, the trial court was not obligated to instruct on the lesser included offenses of the sodomy charges.

B. Sufficiency of the Evidence to Support the Forcible Oral Copulation Convictions

Defendant next contends that the evidence is insufficient to support the two forcible oral copulation convictions. Citing *People v. Pitmon* (1985) 170 Cal.App.3d 38, 47-51, he specifically argues that there is insufficient evidence of duress. In *Pitmon*, the court defined duress to be "a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an

act to which one otherwise would not have submitted." (*Id.* at p. 50, fn. omitted; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13 (*Cochran*).)

In *Cochran*, the court cited the *Pitmon* definition and held that the trier of fact must consider the totality of the circumstances, including the victim's age and relationship to defendant, to determine if there was duress. "Other relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the molestation would result in jeopardizing the family. [Citations.]" (*Cochran, supra*, 103 Cal.App.4th at p. 14.)

In *People v. Senior* (1992) 3 Cal.App.4th 765, the court discussed the definition of "duress" as follows: "Physical control can create 'duress' without constituting 'force.' 'Duress' would be redundant in the cited statutes if its meaning were no different than 'force,' 'violence,' 'menace,' or 'fear of immediate and unlawful bodily injury.' [Citation.] As the jury here was instructed, 'duress' has been defined as 'a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to first, perform an act which otherwise would not have been performed, or, second, acquiesced [*sic*] in an act to which one otherwise would not have submitted.' As this court recognized in *People v. Superior Court* (*Kneip*) (1990) 219 Cal.App.3d 235 . . . duress involves psychological coercion. [Citation.] Duress can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes. [Citations.] 'Where the defendant is a family member and the victim is young . . . the position of

dominance and authority of the defendant and his continuous exploitation of the victim' is relevant to the existence of duress. [Citation.]" (*Id.* at p. 775.)

We find sufficient evidence of duress here. Defendant testified that he was Annette's family, and he acted as a father to her. Although Annette was an adult, her dependence on the family was like that of a child due to her disabilities, especially her limited ability to communicate. Defendant therefore held a position of dominance and authority over her. A second factor was the size differential. Defendant is a large man and Annette is small, fragile, weak and timid. Annette testified that "he's big, he's tall, he's very strong. Very strong. And he would, you know, grab me, and it would hurt." A third factor is Annette's vulnerability. When her grandmother died, Annette had no other alternative living arrangements available to her: as defendant testified, "no one else wanted her." The jury specifically found that she was particularly vulnerable and that defendant took advantage of a position of trust or confidence to commit the offenses. A fourth factor evidencing duress was Annette's testimony that she told defendant "no" but he kept molesting her: "I was mad. I was upset. You know, and I would be in the bedroom, and I'd be, like mad, like I'd wanted to punch a wall or something."

Considering the totality of the circumstances, there was substantial evidence from which the jury could conclude that the oral copulations were the product of duress.

C. Sentencing Issues

Defendant next contends that the trial court erred in imposing full consecutive sentencing under section 667.6, subdivision (d), because the jury did not determine whether the offenses occurred on separate occasions. He argues that such a jury

determination is required by *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Blakely v. Washington* (2004) 532 U.S. 296. He acknowledges that our Supreme Court decided the issue adversely to his contention in *People v. Black* (2005) 35 Cal.4th 1238, and he raises the issue only to preserve it. The issue is presently pending before the U.S. Supreme Court in *Cunningham v. California*. (See *People v. Cunningham* (Apr. 18, 2005, A103501) [nonpub. opn.], cert. granted Feb. 21, 2006, No. 05-6551.)

Respondent raises a sentencing issue by arguing that the trial court should have imposed a separate and independent principal term for counts 3 and 4, the attempted rape charges. Respondent argues that those charges did not fall within the special sentencing provisions of section 667.6, subdivision (d) and were therefore subject to the general determinate sentencing provisions of section 1170.1. Under section 1170.1, a separate principal term for either count 3 or count 4 was required. Instead, the trial court considered one of the 667.6 charges as the principal term and imposed one-third the midterm sentencing on counts 3 and 4.

Respondent relies on *People v. Pelayo* (1999) 69 Cal.App.4th 115. In that case, the court held, "when a defendant is convicted of both violent sex offenses and crimes to which section 1170.1 applies, the sentences for the violent sex offenses must be calculated separately and then added to the terms for the other offenses as calculated under section 1170.1. The trial court erred by making both nonviolent sex offenses subordinate counts and thereby effectively merging one of the section 667.6 offenses into a section 1170.1 term." (*Id.* at p. 124.) Thus, although the court imposed full consecutive sentences for the sex crimes that fell within the definitions of section 667.6,

subdivision (d), it erred when it imposed only subordinate terms for the remaining crimes. The trial court should have imposed a separate principal term for one of the crimes that fell outside of the section 667.6, subdivision (d), sentencing scheme. Thus, in this case, the trial court erred: count 3 should have been imposed as an independent principal term and count 4 could have been imposed as a subordinate term of one-third the midterm.

Defendant argues that the prosecution invited the error or waived the issue by requesting a sentence of one-third the midterm on counts 3 and 4. The trial court followed the prosecution's recommendation, selecting count 1 as the principal term and imposing one-third the midterm sentences on counts 3 and 4. The trial court erred in doing so and defendant concedes that the prosecution's failure to object at sentencing does not bar it from raising the issue here. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) Accordingly, we will remand the case for resentencing. (*People v. Pelayo, supra*, 69 Cal.App.4th at p. 125.)

D. Restitution Fine

As noted above, the parties agree that the imposition of a $50,000 restitution fine under section 1202.4, subdivision (b)(3)(F) was improper because that section only applies to violations of section 288, and there were no such violations in this case. Accordingly, the trial court should strike this fine at resentencing.

DISPOSITION

The case is ordered remanded for resentencing in accordance with the views expressed in this opinion and in all other respects, the judgment is affirmed.

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/s/ RAMIREZ
P.J.

We concur:

/s/ McKINSTER
J.

/s/ MILLER
J.